82-990

No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DR. JACK L. MARVIN,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court of Appeals erroneously sustained a conviction for aiding and abetting when the instruction on that count incorporated an erroneous instruction on scienter which the Court held required reversal of the conviction under the substantive count?

II. Whether the Court of Appeals erroneously refused to reverse a conviction which may have rested upon an instruction to the jury that the Court itself held was grounds for reversal?

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OPINIONS BELOW

The October 14, 1982, memorandum of the Court of Appeals, denying the petition for rehearing, is not reported. It appears in the Appendix, infra, at 1a.

The September 3, 1982, opinion of the Court of Appeals is reported. 687 F.2d 1221 (8th Cir. 1982). It appears verbatim in the

Appendix, infra, beginning at 2a.

The October 29, 1981, unreported opinion of the district court appears in the Appendix, infra, beginning at 34a.

JURISDICTION

(i) The U.S. Court of Appeals rendered the judgment to be reviewed on September 3, 1982.

(ii) The U.S. Court of Appeals denied a petition for rehearing on October 14, 1982.

(iii) Section 1254(1), Title 28, U.S. Code vests jurisdiction in this Court to review this case by certiorari.

STATUTES INVOLVED

The aiding-and-abetting statute, 18 U.S.C. § 2, provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

The underlying substantive statute, 7 U.S.C. § 2024(b), provides:

> (1) Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony ...

STATEMENT OF THE CASE

Petitioner Dr. Jack L. Marvin is a licensed Missouri chiropractic physician. He has practiced his profession in the Kansas City, Missouri area for approximately twenty-five years. (App. 4a). Dr. Marvin was convicted in federal district court[1] for violations of 7 U.S.C. §2024(b). The statute prohibits certain acquistions of food stamps. One count involved the illegal acquisition and possession of food stamp coupons. The remaining two involved aiding and abetting one Anthony R. Astorino in violating the same statute. On appeal, the Eighth Circuit reversed the acquiring and possessing count, but affirmed the conviction as to two aiding and abetting courts. (App. 4a).

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1 The District Court had jurisdiction under 18 U.S.C. § 3231.

The core of the government's case was the testimony of one paid government informant Jack Clark. Mr. Clark attempted to sell to various individuals food stamps which were were supplied by the government. The government alleged and attempted to prove, primarily through Jack Clark's testimony, that Dr. Marvin purchased food stamps on one occasion and arranged and/or bankrolled three other transactions between Jack Clark and one Anthony R. Astorino.

The evidence at trial revealed that on March 10, 1980, Jack Clark and Dr. Marvin did discuss food stamps at Dr. Marvin's clinic.[2] The government's proffer was that a sale was consummated. Dr. Marvin denied that he entered

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2 Dr. Marvin had treated members of Jack Clark's family for a long period of time. He had known Jack since his early childhood. Thus Clark was readily allowed into the Marvin clinic.

into any such transaction. The conviction based on these events was reversed by the Eighth Circuit.

The two Clark/Astorino transactions which led to Dr. Marvin's conviction on two counts of aiding and abetting occurred on April 9, 1980 and May 22, 1980. Astorino, whose wife was a receptionist at the Marvin office, did purchase food stamps from Jack Clark on April 9, 1980. The government contended that Dr. Marvin arranged and financed the sale. Dr. Marvin maintained that he played no role in the transaction. The only evidence linking Dr. Marvin to the May 22, 1980 purchase by Rick Astorino was an alleged phone call between Dr. Marvin and Clark which was initiated by Clark.

Mrs. Astorino pleaded guilty to a misdemeanor and had no actual confinement.

Rick Astorino was tried by the same district court separately from Dr. Marvin who had a jury trial. The Astorinos did not pursue appeals on the questions presented here.

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions in the application of the federal criminal law which are currently unresolved by this Court and on which there is both confusion and dispute among the Courts of Appeal. On each question presented, the decision below is in conflict with the rule in the majority of the Courts of Appeal and with the reasoning, if not the holdings, of decisions by this Court. The result of the error below is that a respected physician in his community, without previous criminal conviction, is faced with imminent incarceration and the destruction of his professional practice.

I. AFTER CORRECTLY REVERSING THE TRIAL COURT ON THE SUBSTANTIVE COUNT FOR ITS ERROR IN FAILING TO CONSTRUE 7 U.S.C. §2024(b) AS REQUIRING KNOWLEDGE THAT TRANSACTING IN FOOD STAMPS WAS ILLEGAL, THE COURT BELOW ERRED IN NOT SIMILARLY REVERSING THE CONVICTIONS FOR AIDING AND ABETTING SINCE THE TRIAL COURT'S CONSTRUCTION OF THE STATUTE AS SET FORTH IN THE INSTRUCTIONS ALLOWED THE JURY TO CONVICT THE DEFENDANT FOR AIDING AND ABETTING A NON-CRIMINAL ACT.

A. The trial court's aiding and abetting instruction to the jury was erroneous since it did not require the jury to find that the principals knew transacting in food stamps was illegal.

This case squarely presents the question of whether a person can be convicted of aiding and abetting the commission of a crime when the

jury was erroneously instructed as to an element in the substantive crime. Defendant was found guilty on one count of unlawfully acquiring and possessing food stamps in violation of 7 U.S.C. §2024(b) (Count I) and two counts of aiding and abetting this offense (Counts II and III).[3]

7 U.S.C. §2024(b) in relevant part states:

> §2024. Violations and enforcement--Coupon redemption.
>
> (b)(1) Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony . . ..

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[3] The aiding and abetting offense was charged under 18 U.S.C. §2(a). The defendant's trial was severed from trial of his co-defendants.

At trial the district court held that the "knowing" requirement as set forth in the statute required only that the defendant know he was acquiring or possessing food stamps. It did not require scienter that the acquisition or possession of food stamps was unlawful. The jury was instructed accordingly not only with respect to Count I but Counts II-IV as well.[4]

On appeal, the Eighth Circuit reversed the conviction on the substantive count, holding that an essential element of the criminal offense is knowledge that the acquisition and possession of the food stamps was illegal. The simple knowledge that a defendant possessed or acquired food stamps was not sufficient to constitute a violation. United States v. Marvin, 687 F.2d 1121, 1127 (8th Cir. 1982).

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[4] The jury acquitted the defendant on Count IV.

See also United States v. O'Brien, 686 F.2d 850 (10th Cir. 1982).

On this basis, the convictions on the aiding and abetting counts should also have been reversed since the trial court's instructions on the elements of §2024(b) omitted any requirement that the jury find the principal specifically intended to violate the law. Without this finding there could be no finding that §2024(b) was violated. Without the establishment of such a violation there could be no conviction for aiding and abetting.

The Eighth Circuit, however, sustained defendant's conviction on the aiding and abetting counts despite its holding that the jury had not been properly instructed as to an essential element (scienter) of the underlying offense. In essence, the Court held that a

proper charge to the jury as to the scienter of the defendant was all that was required in order to sustain the convictions on the aiding and abetting counts. This decision however is erroneous, in conflict with the principles announced by this Court, and in conflict with the rule established in other circuits.

As had been held, aiding and abetting alone does not state a crime. United States v. Oates, 560 F.2d 45 (2nd Cir. 1977). Rather, proof of the existence of the underlying crime is an essential element of any conviction for aiding and abetting the violation of a law. United States v. Raper, 676 F.2d 841 (D.C. Cir. 1982); United States v. Indelicato, 611 F.2d 376 (1st Cir. 1979); United States v. Cades, 495 F.2d 1166 (3rd Cir. 1974); United States v. Rodgers, 419 F.2d 1315 (10th Cir. 1969).

The government must then prove each element of the underlying offense in order to sustain a conviction for aiding and

abetting. See, e.g., Standefer v. United States, 447 U.S. 10 (1980). Without such a rule, an accomplice may be convicted of aiding and abetting an activity not shown to be unlawful, a result this Court has found to be impermissible. Shuttlesworth v. Birmingham, 373 U.S. 262 (1963).

The rule that the government must establish the existence of the underlying offense in aiding and abetting cases is not controversial. The Eighth Circuit itself has recognized this requirement on elements other than the scienter of the principal. United States v. Barker, 542 F.2d 479 (8th Cir. 1976). See also Manning v. Biddle, 14 F.2d 518 (8th Cir. 1926).

In the case at bar, however, the Eighth Circuit apparently drew exception to this well-settled rule with respect to scienter. This exception is illogical. It was not reasoned

out in the opinion below. Without a finding that the principal acted with proper scienter, the underlying crime cannot be established. The aiding and abetting charge must then automatically fall. Cf. Standefer v. United States, 447 U.S. 10 (1980) (government must prove violation of underlying offense).

Other circuits recognize the necessity of reversing a conviction for aiding and abetting when the government has failed to prove that the principal acted with the mental state necessary for conviction of the underlying crime. In United States v. Cleary, 565 F.2d 43 (2nd Cir. 1977), cert. denied, 435 U.S. 915 (1978), a defendant was convicted of aiding and abetting the willful misapplication of bank funds by a bank officer. The trial court instructed the jury that the principal's intent to defraud the bank was not an element of the crime. On appeal, the Second Circuit held that intent to defraud was an element of

the principal offense. It then held that because the jury had not been properly instructed on the scienter element of the principal offense, defendant's conviction for aiding and abetting that offense must be reversed. Id. at 46.

Similarly, in United States v. Tashjian, 660 F.2d 829 (1st Cir. 1981), cert. denied, 102 S.Ct. 681 (1981), a defendant was convicted of aiding and abetting the fraudulent transfer of property in contemplation of bankruptcy, in violation of 18 U.S.C. §152 and §2. The trial court had failed to instruct the jury that the principal's intent to defraud was an essential element of defendant's conviction. The government failed to prove that the principal had a fraudulent intent. The First Circuit held that intent to defraud was an essential element of the principal offense, and that it had not established that the principal offense had been committed.

It concluded that "if Weiner [the principal] did not violate 18 U.S.C. §152. . .it follows that. . .[the accomplice could not have]. . . aided and abetted the alleged violation of §152. We therefore reverse. . ." Id. at 842. See also Giragosian v. United States, 349 F.2d 166 (1st Cir. 1975).

Despite the fact that reversal of petitioner's conviction is support by the weight of authority, the court below chose to join the Third Circuit. United States v. Bryan, 483 F.2d 88 (3rd Cir. 1973) (en banc), had held that scienter of the principal in the substantive crime was not an element of aiding and abetting. Bryan upheld a conviction for aiding and abetting the theft of liquor in violation of 18 U.S.C. §659. At a bench trial, the principal was acquitted on the express ground that he lacked the requisite intent. The court held that absence of an element of the underlying crime "does not absolve Bryan

of guilt for his participation in the crime." Id. at 94.

That the holdings of the Third Circuit in Bryan and of the court below were in error is strongly implied by two decisions of this Court. In Shuttlesworth v. Birmingham, 373 U.S. 262 (1963), the Court reversed a conviction for aiding and abetting the violation of an ordinance prohibiting parading without a permit. This court held that the principal's conduct was protected by the First Amendment. This Court then reversed defendant's aiding and abetting conviction, holding that it was not unlawful to aid and abet a non-criminal act. Id. at 265. Obviously, until the government has proved all elements of an offense, it has not proved that an act is criminal. More recently, Standefer v. United States, 447 U.S. 10 (1980), held that an accomplice may be convicted even though the principal was acquitted in a

separate trial. The Court emphasized that in the aiding and abetting trial the jury was required to find that the Government had proved all elements of the underlying crime. Id. at 13, n.6. It was on this basis that Shuttlesworth was distinguished. Id. at 20, n. 14. The Court concluded by saying "petitioner received a fair trial at which the Government bore the burden of proving beyond a reasonable doubt that. . .[the principal was guilty of the underlying crime]. . .He was entitled to no less." Id. at 26. Similarly, here the conviction cannot stand without the jury's finding the principal was guilty of the substantive offense with the requisite scienter. Therefore, this petition should be granted.

B. The trial court's aiding and abetting instruction to the jury was erroneous since it did not require, or was at best ambiguous in requiring, that in

> order to convict the defendant of aiding and abetting the jury must find that the defendant knew that transacting in food stamps was illegal.

The court below held that a proper instruction on scienter had been issued on the aiding and abetting count despite the fact that the trial court explicitly stated the contrary. (App. 47a). In the trial court's view, the jury was not required to find the defendant had specific intent in order to convict on the aiding and abetting charge, since specific intent was not required on the substantive charge. On this theory the trial court rejected defendant's proposed instructions calling for a specific intent charge on the aiding and abetting counts. (Id.)

Ignoring the trial court's characterization of its own instruction, the court below instead affirmed the aiding and abetting conviction relying on a lone instruction issued by the trial court on this issue. The trial court had instructed:

> "An act is done 'willfully' if done voluntarily and intentionally, and with specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law." TR.at 453.

This instruction, according to the Eighth Circuit, saved the aiding and abetting conviction since unlike the trial court's charge on the substantive count, it ostensibly required that the jury find the defendant knew he was breaking the law. United States v. Marvin, 687 F.2d at 1228.

The Eighth Circuit's construction of the trial court's instruction is out of context and is not defensible. It is axiomatic that

trial instructions must be reviwed as a whole. United States v. Palmeri, 630 F.2d 192 (3rd Cir. 1980), cert. denied, 101 S.Ct. 1484 (1980). Here the instructions indicated that intent to violate the food stamp law was not a part of the substantive crime. The jury had been instructed that transacting in food stamps was simply unlawful. Thus the logical understanding the jury would have of the aiding and abetting instruction was that willfully aiding persons transacting in food stamps was similarly unlawful. Without a clarifying instruction it is unrealistic to assume that the jury would understand that in order to convict on the substantive count knowledge of illegality was not required while on the aiding and abetting count it was. This is particularly evident since the trial court had explicitly indicated that the requisite knowledge on the substantive and aiding and abetting charges was the same. Immediately

after reading 18 U.S.C. §2(a), the trial court instructed:

> "In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally." TR. at 52 (emphasis addedd).

This instruction contains the exact same language used by the trial court in its instruction on the substantive offense. It is the exact language, moreover, which led the Eighth Circuit to reverse the substantive count as not indicating proper scienter. United States v. Marvin, 687 F.2d at 1228.

Given this context, the instruction cannot be fairly said to require the jury to find the defendant aided a principal's transacting in food stamps knowing such to be illegal. At best the instruction is confusing. Thus in holding that the conviction was saved, the Eighth Circuit is in error as well as in

conflict with the Fourth Circuit in United States v. Walker, 677 F.2d 1014 (4th Cir. 1982) (correct instruction does not cure confusion already created), with the Seventh Circuit in United Staes v. Barclay, 560 F.2d 812 (7th Cir. 1977)(use of term "specific intent" not sufficient unless defined and its applicability to case made clear), and with the First Circuit in Polansky v. United States, 332 F.2d 233 (1st Cir. 1964)(correct instruction does not cure confusion already created). It is also inconsistent with the rule established in this Court that the jury cannot be expected to disregard a judge's bad instructions on the law. Bollenbach v. United States, 326 U.S. 607 (1946). The petition should therefore be granted and the conviction reversed.

II. EVEN IF THE TRIAL COURT'S AIDING AND ABETTING INSTRUCTION WAS CORRECT, THE CONVICTIONS AS TO COUNTS II AND III SHOULD STILL BE REVERSED SINCE THE JURY'S FINDING OF

GUILTY ON THESE COUNTS MAY HAVE RESTED UPON THE INSTRUCTION ON THE SUBSTANTIVE CHARGE THAT THE COURT BELOW FOUND TO BE DEFECTIVE.

Because the trial court's instructions were ambiguous as to whether petitioner was accused in Counts II and III of violating §2024(b) or of aiding and abetting its violation, the reversal on the substantive conviction necessarily requires reversal on the aiding and abetting conviction. Thus, even if it is assumed that the instructions of the trial court on the elements of aiding and abetting were correct, the conviction of petitioner on Counts II and III of the indictment should be reversed since, as the appellate court held, the instructions on the elements of §2024(b) were fatally defective. It is well settled that if a conviction may have rested on multiple grounds and one of those grounds was improper and reversible then the conviction must be reversed and

remanded. United States v. Donnelly, 179 F.2d 227 (7th Cir. 1950).

The ambiguity of the court's instructions is manifest. The court initially instructed the jury that "[t]he defendant, Jack L. Marvin, is charged in four counts of violations of 7 U.S.C. §2024(b). . .Four essential elements are required to be proved in order to establish the offenses charged in the indictment." TR. at 449. The court then gave the instruction which was reversed as to Count I by the court below. The court did not instruct the jury that Counts II- IV were based on a theory of aiding and abetting or that the elements needed to convict were different for the first count than for the latter ones. Instead, the jury was instructed that the same elements were necessary to convict on all four counts and that intent to violate the law was not one of those elements.

This erroneous impression was reinforced by the indictment, which was included in the instructions by the court and requested by and given to the jury for use during deliberation. TR.445-449, 469. With the exception of amounts, places, and dates, the only substantive difference in the counts is that Count I names only Di Marvin and cites only 7 U.S.C. §2024(b). The latter counts name defendant and Anthony Astorino. They cite §2024(b) and 18 U.S.C. §2. Clearly, from the indictment alone, it is implausible that the jury understood that the latter counts required proof of fundamentally different elements than the first count. Thus, the indictment served to compound the earlier errors.

The trial court's instructions on aiding and abetting did not rectify these earlier errors. These instructions stated only that: "in a case where two or more persons are charged with the commission of a crime, the

guilt of any may be established without proof that he personally did every act constituting the offense charged." The court then simply defined the elements of aiding and abetting. It did not specifically refer to any count or exclude any count in its instruction. Thus the most natural understanding would be that aiding and abetting was an alternative basis for conviction on Counts II, III and IV.

Under these circumstances, it is impossible to say on what theory defendant's convictions on Count II and III rested. Under the instructions it was permissible for the jury to conclude that they could convict on either of two theories. Since under the erroneous instruction of the trial court it was not necessary to find that defendant had the specific intent to violate the law, the jury could have convicted on Counts II and III on this basis. Thus convictions on those counts must be reversed.

Notwithstanding the above, the court below sustained defendant's conviction, holding that "it is clear in context that Marvin was not charged in these two counts with acquiring or possessing food stamps himself, but rather with helping someone else to do so." United States v. Marvin, 687 F.2d at 1228. This holding was based on the understanding that the only source of confusion was the indictment. Id.

As has been shown, that is simply not the case. Confusion and ambiguity infest the whole of the trial court's instructions. It is fundamental that "a conviction ought not to rest on the equivocal direction of a court on a basic issue." Bollenbach v. United States, 326 U.S. 607, 613 (1946). It is not reasonable to assume that the jury was able to determine which part of a contradictory charge was correct. Polansky v. United States, 332 F.2d 233, 236 (1st Cir. 1964). Instead, it is the duty of the court to reverse when it is

impossible to tell which of two contradictory instructions were followed. Mills v. United States, 164 U.S. 644 (1897). The decision of the court below departs from these fundamental and broadly recognized principles and should therefore be reversed.

CONCLUSIONS

For the reasons set out, the Court should grant the petition for a writ of certiorari and set this case for briefing and argument.

Respectfully submitted,

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